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No. 99-1726

In the Supreme Court of the United States

SANDRA KAY BATTISTA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, APPOINTED RECEIVER OF BANK OF NEWPORT, A FAILED DEPOSITORY INSTITUTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1821(d) and (e) require the FDIC as receiver to pay claims for damages arising from repudiated employment contracts with cash rather than receiver's certificates redeemable for a pro rata share of the assets of the failed bank.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 195 F.3d 1113. The opinion of the district court (Pet. App. 22a-26a) and the order of the district court denying reconsideration (Pet. App. 19a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1999. A petition for rehearing was denied on January 27, 2000 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on April 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) serves as receiver of failed insured depository institutions. 12 U.S.C. 1821(c). As receiver, the FDIC is authorized to determine and to pay claims against the financial institution in accordance with specified procedures. See 12 U.S.C. 1821(d)(3)-(13). Section 1821(d)(11) requires the FDIC as receiver to pay claims (other than secured claims to the extent of such security) with "amounts realized from the liquidation or other resolution of any insured depository institution" in a specified order of priority. 12 U.S.C. 1821(d)(11). "Administrative expenses of the receiver" are paid first, deposit liabilities next, and general creditors and other claimants last. 12 U.S.C. 1821(d)(11)(A). To the extent that the priority scheme set out in Section 1821(d)(11)(A) is inconsistent with state law, Section 1821(d)(11)(A) prevails. See 12 U.S.C. 1821(d)(11)(B)(i).

Section 1821(e) authorizes the FDIC as receiver to repudiate contracts entered into by a failed bank, including employment contracts, which the receiver determines to be burdensome and detrimental to the orderly liquidation of the bank. 12 U.S.C. 1821(e)(1). Subject to some limited exceptions not relevant here, "the liability of the * * * receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1)" is "(i) limited to actual direct compensatory damages; and (ii) determined as of * * * the date of the appointment of the * * * receiver." 12 U.S.C. 1821(e)(3)(A). Claims for "services performed before the appointment of the * * * receiver" must be "paid in accordance with [Section 1821(d) and 12 U.S.C. 1821(i)]." 12 U.S.C. 1821(e)(7)(A) and (A)(i).

Section 1821(i) specifies how claims against the receiver shall be valued. As relevant here, it provides that "[t]he maximum liability of the [FDIC] acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the [FDIC] had liquidated the assets and liabilities of such institution." 12 U.S.C. 1821(i)(2).

2. The Bank of Newport (Bank) provided severance and separation benefits to employees who were terminated without just cause (the Severance Policy). Pet. App. 2a-3a. In 1994, the Superintendent of Banks for the State of California determined that the Bank was insolvent and appointed the FDIC as its receiver. *Id.* at 3a. The FDIC as receiver (respondent) repudiated the Severance Policy pursuant to 12 U.S.C. 1821(e). Pet. App. 31a. Petitioners, former employees of the Bank, filed claims for repudiation damages with respondent in accordance with the procedures set out in 12 U.S.C. 1821(d)(3) and (5). See Pet. App. 31a. Respondent denied the claims, and petitioners sued for repudiation damages. *Id.* at 27a.

In September 1997, the parties executed and filed a stipulation, which provided that petitioners had valid repudiation claims that entitled them to a judgment in the aggregate sum of $731,354.80. Pet. App. 31a-36a. Respondent then moved for an order specifying that the judgment be paid by receiver's certificates, which entitle the holders to a pro rata share of the receivership's assets in accordance with the order of priority prescribed in Section 1821(d)(11). *Id.* at 38a. Petitioners, contending that repudiation claims must be

paid in cash from the funds of the FDIC, opposed that motion. *Id.* at 23a.[1]

On September 29, 1997, the district court issued an opinion finding that petitioners are not entitled to cash payments. Pet. App. 22a-26a. On November 3, 1997, the district court denied petitioners' motion for reconsideration, *id.* at 19a-21a, and petitioners appealed.

The Ninth Circuit affirmed. Pet. App. 1a-18a. Citing *Resolution Trust Corp.* v. *Titan Financial Corp.*, 36 F.3d 891, 892 (9th Cir. 1994), the court explained that the FDIC as receiver may pay creditors with receiver's certificates instead of cash. Pet. App. 6a. The court rejected petitioners' argument that an employee claimant entitled to "damages" under Section 1821(e) is, unlike other claimants, entitled to be paid in cash and from funds other than those raised from the liquidation of the failed bank's assets. *Id.* at 7a. The court found that the text of Section 1821, the FDIC's regulations, and relevant case law support respondent's contrary position that it may satisfy those claims, like other claims against the receiver, with receiver's certificates. *Id.* at 7a-15a.

The court also rejected petitioners' arguments that California law requires severance payments to be paid in cash. Pet. App. 15a-16a. The court noted that it is not entirely clear that California law treats severance payments as subject to the cash-payment requirement that applies to wages. *Id.* at 15a n.8. In any event, the

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[1] The parties also joined issue on whether petitioners are entitled to prejudgment interest on their repudiation claims. The district court ruled that petitioners are not so entitled, Pet. App. 26a, the court of appeals affirmed that ruling, *id.* at 16a-18a, and petitioners have not sought this Court's review of that aspect of the court of appeals' decision.

court held, such a requirement would be inconsistent with the priority provisions of Section 1821(d)(11) and would therefore be preempted in accordance with Section 1821(d)(11)(B)(i). *Id.* at 15a-16a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court. Indeed, petitioners acknowledge that the question presented by their petition is one "of first impression." Pet. 3. This Court's review is therefore not warranted.

1. The court of appeals correctly held that the FDIC as receiver may pay claims arising from its repudiation of contracts with receivership certificates, just as it may pay other claims against the receivership with those certificates. As the court explained, that conclusion flows from the text of 18 U.S.C. 1821 (1994 & Supp. 1998), the FDIC's regulations interpreting that provision, and case law interpreting the statutory scheme. See Pet. App. 7a.

a. In 1989, in response to the financial crisis posed by multiple bank and thrift failures, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which contains a comprehensive scheme for presenting and determining claims against failed federally-insured financial institutions. See *Henderson* v. *Bank of New England*, 986 F.2d 319, 320 (9th Cir.), cert. denied, 510 U.S. 995 (1993). Most FIRREA provisions affecting failed banks are contained in the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1811 *et seq.*

As the court of appeals recognized (Pet. App. 6a, 10a), FIRREA limits the claims of unsecured general creditors of each failed institution to a pro rata share of the proceeds from the liquidation of the insolvent

financial institution, unless the FDIC chooses to make additional payments from the bank insurance fund. See 12 U.S.C. 1821(i)(2). Congress provided no other source of funds for the payment of claims arising from the receiver's actions, including its repudiation of the failed bank's contracts.

Moreover, in 1993, Congress amended FIRREA to provide that claims be paid in an order that would both ensure the orderly administration of the receivership estate and maximize protection of depositors of failed institutions. See Pub. L. No. 103-66, § 3001, 107 Stat. 336 (12 U.S.C. 1821(d)(11)). Under that amendment, administrative expenses of the receivership are paid first, deposit liabilities are paid next, and other claims are paid only after those two categories are satisfied. 12 U.S.C. 1821(d)(11)(A). At the same time, Congress reaffirmed that claimants are limited to a pro rata share of the remaining assets of the failed institution by specifying that claims are to be paid from "amounts realized from the liquidation or other resolution" of the institution. See *ibid.*

To implement those provisions, the FDIC as receiver is vested with broad discretion to "pay creditor claims * * * *in such manner and amounts* as are authorized under [the FDI Act]." 12 U.S.C. 1821(d)(10)(A) (emphasis added). As the court of appeals explained, the FDIC uses receiver's certificates as its manner of payment in order to ensure that claimants receive only a pro rata share of the proceeds from the liquidation of a failed financial institution's assets, as specified by Section 1821(i)(2), in the order of priority specified by Section 1821(d)(11). See Pet. App. 6a-7a. "To require the FDIC to pay certain creditors in cash would allow those creditors to 'jump the line,' recovering more than their pro rata share of the liquidated assets, if [as is

often the case] the financial institution's debts exceed its assets." *Id.* at 7a. See *Resolution Trust Corp.* v. *Titan Fin. Corp.*, 36 F.3d 891, 892 (9th Cir. 1994).

The authority of a receiver to structure payments so that claimants receive only their pro rata distribution of the assets of the failed institution is supported by cases decided both before and after FIRREA. See *McAllister* v. *Resolution Trust Corp.*, 201 F.3d 570, 581 (5th Cir. 2000) (receiver's certificates); *Titan Fin. Corp.*, 36 F.3d at 892 (same); see also *United States ex rel. White* v. *Knox*, 111 U.S. 784, 786 (1884); *Adams* v. *Zimmerman*, 73 F.3d 1164, 1171-1172 (1st Cir. 1996); *Woodbridge Plaza* v. *Bank of Irvine*, 815 F.2d 538, 541-542 (9th Cir. 1987); *First Empire Bank* v. *FDIC*, 572 F.2d 1361, 1371 (9th Cir.), cert. denied, 439 U.S. 919 (1978).[2]

b. Petitioners do not take issue with the FDIC's authority generally to pay claims against the receivership with receivership certificates, but they argue (Pet. 7-22) that this method of payment may not be used to satisfy claims for damages arising from the repudiation of contracts under Section 1821(e). As the court of appeals explained (Pet. App. 7a-15a), that argument is not tenable.

Under Section 1821, the receiver's repudiation of a preexisting contract of the failed institution gives rise

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[2] Authority for the use of receiver's certificates is further provided by 12 U.S.C. 1821(d)(10)(B), which states that "[t]he receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time." That provision depends on the premise that the FDIC as receiver may pay an approved creditor or claimant of a failed bank by delivering a certificate that entitles the holder to its share of the failed bank's assets. The receiver may then pay dividends on the certificates as funds from liquidated assets become available.

to an ordinary contract claim against the receiver, albeit one for limited damages. See *Howell* v. *FDIC*, 986 F.2d 569, 571 (1st Cir. 1993). Section 1821(e)(3) limits the damages for which the receiver is liable under a repudiation claim to "actual direct compensatory damages." 12 U.S.C. 1821(e)(3)(A)(i). Congress employed the phrase "actual direct compensatory damages" in order to restrict the amount recoverable by a repudiation claimant. See 12 U.S.C. 1821(e)(3)(B) ("actual direct compensatory damages" do not include punitive or exemplary damages, damages for lost profits or opportunity, or damages for pain and suffering); *Lawson* v. *FDIC*, 3 F.3d 11, 15 (1st Cir. 1993). Congress did not establish a separate payment scheme for repudiation claims.[3]

Nor does any other provision of Section 1821(e) exempt a contract-repudiation claim from Section 1821(d)'s general procedures for the determination and payment of claims or Section 1821(i)(2)'s requirement that a claimant's recovery not exceed his pro rata share of the liquidated institution's assets. To the contrary, Section 1821(e) expressly provides that repudiation

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[3] There is no merit to petitioners' contention (Pet. 7-14) that Congress used the phrase "actual direct compensatory damages" to indicate that repudiation claimants must be paid in cash and made whole even when the institution's assets are insufficient to satisfy other claimants. Indeed, petitioners' argument stands Section 1821(e)(3) on its head: as the text above explains, that Section was designed to limit recovery by contract-repudiation claimants, not to give them preference over other claimants. It is thus not surprising that no court has ever held that Section 1821(e)(3) has the effect that petitioners attribute to it. Moreover, as petitioners themselves acknowledge (Pet. 10), no court has adopted the more general premise on which their argument depends—that damages must invariably be paid in cash.

claims of the type asserted by petitioners are subject to those provisions. 12 U.S.C. 1821(e)(7)(A) and (A)(i) ("In the case of any contract for services between any person and any insured depository institution for which the [FDIC] has been appointed conservator or receiver, any claim of such person for services performed before the appointment of the conservator or the receiver shall be * * * a claim to be paid in accordance with [Section 1821(d) and (i)].").

As the court of appeals reasoned, "if Congress had wished to depart from the § 1821(d) regime for claims for damages under § 1821(e), presumably it would have said so. In fact, it did just that in § 1821(f) with respect to the payment of insured deposits." Pet. App. 9a. That Section requires payment of insured depositors "as soon as possible * * * either by cash [from the Bank Insurance Fund] or by making available to each depositor a transferred deposit in a new insured depository institution." 12 U.S.C. 1821(f)(1). See also 12 U.S.C. 1821(i)(3)(A) (the FDIC may "in its discretion and in the interests of minimizing its losses" use its own funds to pay a claimant).

Moreover, in Section 1821(f), Congress expressly authorized the FDIC to create a separate procedure for determining claims arising under that Section. See 12 U.S.C. 1821(f)(2)-(5). Congress did not, however, authorize an independent claims process for claims under Section 1821(e). The failure to do so indicates a congressional intent that repudiation claims be subject to the general process set out in Section 1821(d).[4]

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[4] Section 1821(f) thus refutes petitioners' contention (Pet. 15-18) that the failure to provide a determination and claims process (with such features as notice and time limits for filing and deciding claims) supports their assertion of a right to immediate cash

Furthermore, as the court of appeals explained (Pet. App. 10a-12a), to accept petitioners' contention that contract-repudiation claims must be paid immediately and in cash would undermine the distribution priority set forth in Section 1821(d)(11). That provision gives no indication that Congress intended such a result. Indeed, it suggests the opposite. Depositor claims under Section 1821(f) are singled out and given priority by the text of Section 1821(d)(11)(A) over general unsecured claims, but contract-repudiation claims under Section 1821(e) are not. Moreover, Section 1821(d)(11)(A) refutes any suggestion (see Pet. 19) that contract-repudiation claims can be distinguished from other claims because they are triggered by the action of the receiver. "Administrative expenses of the receiver," which also result from the receiver's exercise of its discretion, are expressly included within the ambit of Section 1821(d). See 12 U.S.C. 1821(d)(11)(A)(i).[5]

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payment. Petitioners' related contention that the process set out in Section 1821(d) is "simply inapplicable and inappropriate to its use for 'damages' claims" (Pet. 15) is contradicted by their acknowledgment (Pet. 17) that the FDIC, with court approval, has been using that process for those claims. Indeed, petitioners availed themselves of several provisions of Section 1821(d) to present their claims in this very case to the FDIC. See p. 3, *supra*; Pet. App. 31a (with only three exceptions, "each plaintiff duly executed and timely filed with FDIC its executed claim form demanding payment").

[5] Claims for severance pay are not administrative claims because severance pay is compensation for employment services performed before the receivership. See *In re Pacific Far East Line, Inc.*, 713 F.2d 476, 478 (9th Cir. 1983). The FDIC has promulgated a regulation interpreting Section 1821(d)(11) and specifying what constitutes an administrative expense. See 12 C.F.R. 360.4 (administrative expenses include those that "the receiver determines are necessary and appropriate to facilitate the smooth and orderly

Finally, petitioners' contention (Pet. 18-22) that repudiation damages are payable "by the FDIC from its own resources" (Pet. 22) is inconsistent with 12 U.S.C. 1821(i)(2), which provides that the maximum liability of the FDIC, acting "as receiver or in any other capacity, to any person having a claim against the receiver" is equal to the amount such claimant would have received if the receiver had liquidated the failed institution. See also 12 U.S.C. 1821(e)(3)(A) (discussing "liability of the conservator or *receiver* for the disaffirmance or repudiation of any contract") (emphasis added). Although the FDIC in its corporate capacity is the federal insurer of deposits, it is a separate jural entity and is not liable for the actions of the receiver, a federal liquidator. See *Bullion Servs., Inc.* v. *Valley State Bank*, 50 F.3d 705, 708-709 (9th Cir. 1995) (the FDIC in its corporate capacity is a legally distinct entity and is not liable for the actions of the FDIC as receiver). Indeed, the FDIC in its corporate capacity is not even a party to this litigation.

2. Petitioners argue (Pet. 22-24) that the court of appeals erred in failing to give effect to California law,

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liquidation or other resolution of the institution"). In the course of the rulemaking, the FDIC determined that administrative expenses "[g]enerally * * * do not include * * * severance pay claims, golden parachute claims and claims arising from contract repudiations." 60 Fed. Reg. 35,487 (1995). Thus, as the court of appeals explained (Pet. App. 12a-13a), the FDIC, in direct conflict with petitioners' contentions here, has interpreted the statute and its regulations to provide that contract-repudiation claims are subject to the provisions of Section 1821(d) but are not entitled to the same priority as administrative claims. That interpretation is entitled to deference. See *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1663 (2000); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

which petitioners contend requires that severance payments be made in cash. They further argue (Pet. 22, 24) that the court of appeals' decision conflicts with this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994), which held that state law governs the FDIC's resolution of claims "except where some provision in the extensive framework of FIRREA provides otherwise." Neither argument has merit.

As the court of appeals noted, it is not clear that the California Code provisions cited by petitioners, Cal. Lab. Code § 200(a) (West 1989); *id.* § 212(a) (West 1989 & Supp. 2000), require the payment of severance benefits in cash. See Pet. App. 15a n.8. More important, the distribution and payment scheme in Section 1821(d) expressly preempts state law "to the extent such law is inconsistent" with its provisions. See 12 U.S.C. 1821(d)(11)(B)(i). A state law requiring the receiver to pay severance benefits in cash would be inconsistent with Section 1821(d)'s distribution scheme, which treats claimants like petitioners the same as other unsecured general creditors and subordinates their claims to administrative and depositor claims. As the court of appeals explained, California law as understood by petitioners would entitle them to "payment in full, while other claimants would be limited to their share of whatever bank assets were left over." Pet. App. 16a.

Thus, the court of appeals correctly decided that Section 1821(d)(11) preempts the California law on which petitioners rely. See *Monrad v. FDIC*, 62 F.3d 1169, 1173 (9th Cir. 1995) (receiver's liability for severance payments is to be determined under federal law). Moreover, the court's decision is fully consistent with *O'Melveny & Myers*, because Section 1821(d)(11)(B)(i) expressly provides that Section 1821(d)(11) takes precedence over inconsistent state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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